STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB GROUP INSURANCE COMPANY,

Plaintiff-Appellant,

v

ROWENA RAMOS,

Defendant,

and

RICARDO SANTO CHING,

Defendant-Appellee.

UNPUBLISHED
June 30, 2011

No. 297397
Macomb Circuit Court
LC No. 2009-002740-CK

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff Auto Club Group Insurance Company ("Auto Club") appeals by delayed leave granted the order denying its motion for summary disposition brought pursuant to MCR 2.116(C)(10) in this declaratory judgment action. We reverse and remand.

Defendant-appellee Ricardo Santo Ching (hereinafter defendant) is the uncle of defendant Rowena Ramos. This matter arises from conduct that occurred on September 27, 2007, when Ramos was 34 years old and defendant was 56 years old. In 2008, Ramos brought an action against defendant and his wife, Miritess Ching, alleging negligence and assault and battery. Specifically, Ramos alleged that defendant asked her for a massage as he had done on previous occasions. When Ramos did not understand the area in which defendant wanted to be massaged, defendant instructed Ramos to lie down on a couch so that he could demonstrate where he wanted her to massage him. Ramos alleged that as defendant demonstrated the areas he wanted massaged, he touched her buttocks, breasts, and vaginal area without her consent.

Ramos' negligence claim alleged that "The acts and the consequences were unintentional in that . . . [defendant] misapprehended that . . . Ramos did not consent to the acts." Ramos characterized the touching as offensive and alleged that she suffered injuries as a result.

Ramos also alleged a claim of assault and battery. She alleged that defendant "deliberately and intentionally assaulted [her] with the intention of making unprivileged sexual contact and . . . without privilege or consent, did touch her on or about the buttocks, breast, and vaginal area . . ." Ramos alleged that she suffered various injuries as a result.

Auto Club, defendant's homeowner's insurance provider at the time of the incident, filed this declaratory action after Ramos filed her complaint against defendant. By the time plaintiff filed this action, defendant had entered a plea in a criminal action brought against him based on his conduct with Ramos. He pleaded nolo contendere to one count of fourth-degree criminal sexual conduct on April 22, 2008, and was sentenced in June 2008 to five years' probation.

In its declaratory action, Auto Club alleged that the conduct upon which Ramos' claims are based falls outside the conduct covered by the insurance policy issued to defendant. Auto Club asserted that the conduct was not an "occurrence" as that term is used in the policy and therefore defendant is not afforded coverage under the policy. Auto Club also asserted that coverage is excluded under certain provisions of the policy because Ramos' injuries resulted from sexual molestation and because it arose from a criminal act by defendant. Auto Club sought a declaration from the court that for various reasons it had no duty to defend and that defendant is not entitled to liability insurance coverage.

Auto Club moved for summary disposition pursuant to MCR 2.116(C)(10). Auto Club argued that defendant's conduct was not an "occurrence" or "accident" within the meaning of its general insurance agreement because defendant intentionally put his hands inside Ramos' pants, rubbed and kissed her buttocks, touched her breasts, and came close to touching her vagina. It noted that the intentional nature of defendant's conduct was confirmed by Ramos' allegations that he "intentionally assaulted" her "with the intention of making unprivileged sexual contact." Auto Club also maintained that Ramos' allegation that defendant "negligently administered a massage" and that his actions and consequences were unintentional, was an impermissible attempt to trigger insurance coverage. Additionally, Auto Club argued that three exclusions precluded coverage:

> 1. The exclusion for "bodily injury . . . resulting from an act . . . by an insured person which is intended or could reasonably be expected to cause bodily injury" applied because defendant's intentional acts could reasonably be expected to cause bodily injury to Ms. Ramos.
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> 2. The exclusion for "bodily injury arising from sexual molestation" applied based on defendant's multiple sexual touchings.
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> 3. The exclusion for "bodily injury . . . resulting from . . . a criminal act" applied because defendant's nonconsensual sexual contact with his niece satisfied the elements of fourth degree criminal sexual conduct in MCL 750.520e(1)(b).

In sum, Auto Club asserted that there is no dispute of fact that the conduct from which Ramos' alleged injuries arose was not conduct covered by the policy and was otherwise subject to an exclusion and, therefore, Auto Club was entitled to judgment in its favor as a matter of law.

Defendant and Ramos filed separate responses to Auto Club's motion. Both admitted that the complaint alleged a "sexual assault." Both challenged Auto Club's interpretation of the policy terms and their applicability to the circumstances of this case. They argued that coverage might exist because the complaint contained a "negligence" claim and that questions of fact existed regarding the applicability of all of Auto Club's policy provisions.

The trial court held a hearing on Auto Club's motion on September 14, 2009. The trial court denied the motion, stating only that, "With that, there is enough issue of facts in this case where we're just going to have to deny the motion for summary disposition." Auto Club thereafter sought reconsideration seeking clarification of the court's opinion. Auto Club asserted in part:

> 5. That the plaintiff argued, in its Brief and at Oral Argument, that the Michigan Supreme Court has ruled in *Auto Owners Ins Co v Churchman*, 440 Mich 560, 566 (1992) that when deciding whether an insurance policy covers a particular act, the court must perform a two part test.
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> First, a court must review the "occurrence" section of the policy to determine if it includes the particular act.
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> Second, if the particular act is included in the "occurrence" section, the Court must then review the "exclusion" section of the policy to determine whether coverage is denied under any of the policies [sic] exclusions.
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> 6. That the plaintiff very respectfully submits that the language of the Court's opinion does not indicate that the court performed the two part test, as there was no determination in the language that the "issue of facts" applied to the first part of the test, that an "occurrence" occurred, or to the second part of the test, that if an "occurrence" did occur, any of the claimed exclusions applied.

In an opinion and order issued on reconsideration, the trial court opined:

> In reviewing the transcript of the hearing held on September 14, 2009, the primary arguments revolved around the objective and subjective positions of the participants in the activity which prompted this lawsuit. In order to determine whether the activity was an "occurrence" a factfinder must determine, from the point of view of the actors, that conclusion, and therefore, whether coverage is available. Both parties admitted that there was conflicting testimony given by Defendant which went to whether or not his acts were intentional. In this regard, the Court found questions of fact, and accordingly, was compelled to deny the motion. For clarification purposes, the Court was unable to make a ruling regarding the two-part test in determining whether an "occurrence" occurred.

Auto Club argues that the trial court erred by denying summary disposition in favor of defendant on the issue of coverage because Ramos' bodily injury was not caused by an occurrence. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362,

369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence. MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120. The nonmoving party then has the burden to produce admissible evidence to establish disputed facts. *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005). The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

Resolution of the issue presented requires interpretation of the applicable insurance provisions. The courts interpret insurance policies in accordance with their plain and ordinary meaning with the goal being to determine and give effect to the parties' intent. *Hastings Mutual Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). If the policy language is clear and unambiguous, the courts must interpret and enforce the policy as written because, as a matter of law, an unambiguous contract reflects the parties' intent. *Id*. Where the insurance policy does not include definitions for terms, dictionary definitions may be considered to determine their plain and ordinary meanings. *Id*. at 294.

The policy issued by Auto Club to defendant provides that Auto Club "will pay damages for which an insured person is legally liable because of bodily injury . . . caused by an *occurrence* covered by this Policy." [Emphasis added]. The policy also provides that Auto Club will defend a suit only if it arises from an occurrence covered by the policy. The policy includes the following important definitions:

> 1. Occurrence means an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.
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> 2. Accident means a fortuitous event or chance happening that is neither reasonably anticipated nor reasonably foreseen from the standpoint of both any insured person and any person suffering injury or damages as a result.

Auto Club argues that defendant's conduct was not a fortuitous event or chance happening because it was intentional and for that reason it was not an accident. Because it was not an accident, Auto Club asserts, it was not an "occurrence" under the policy and as a result Auto Club is not liable to defendant for coverage for any bodily injury that Ramos suffered. This argument has merit.

Defendant testified that Ramos began living with him, his wife, and their daughter in April 2007. Ramos paid $50 a month in rent. Defendant recalled Ramos gave him back massages on five occasions before the incident that is the focus of this case. Defendant asked for massages because his back hurt from work. There were times when his wife and daughter

massaged his back as well. With Ramos, defendant would first massage her to show her how and where he wanted her to massage him. He denied ever touching Ramos in a sexual way before the last encounter.

On the night of the last encounter, defendant asked Ramos to give him a massage. He massaged her first. Ramos laid down, and defendant lifted her shirt up, as he had done during three other massages. He started rubbing Ramos' back, using lotion. He pulled her pants down so that the crack of her buttocks showed. He had done this before. She did not protest on this occasion, and she had not protested on the previous occasions.

Defendant commented that Ramos had a nice back. He laid down on top of her and told her he wanted to hug her. He had not done this before. He denied having done this for sexual gratification and he denied being sexually aroused.

Defendant put his hands inside of Ramos' pants and rubbed her buttocks. He testified that he did not "really know" whether he did this for sexual gratification. When hugging Ramos from behind, he asked her whether her nipples were big. At this time, he did not have sexual gratification in mind. Ramos did not resist. Defendant admitted that during this time, he kissed Ramos' butt crack one time. Defendant stopped this conduct when his daughter came home because he did not want his daughter to see what was going on.

Ramos testified that on two prior occasions she massaged defendant. He had complained of a sore back and showed her how he wanted to be massaged by demonstrating on her. On those occasions, he massaged only her back. She had seen defendant's daughter massage him before, so she thought it was normal. Ramos did not like being massaged, and she told defendant this. Each time he did this, she was tense. His massage demonstrations lasted about five minutes.

According to Ramos, on this particular occasion she and defendant bickered first when he told her he wanted a massage and that he wanted it in a different location on his back. Ramos ultimately laid down to allow him to show her what he wanted. She was face down on a futon, and defendant pulled up her shirt as he had done on previous occasions. Ramos was wearing a sports bra. Ramos testified that she had her hands in front her with her fists clenched while she lay on the futon. She told defendant she hated massages, and he told her to relax. Defendant was touching her for an hour and a half. He massaged her back, touched her breasts, and touched her front. She squirmed, and he squirmed with her. Ramos admitted she did not leave, but stated that she wanted to. She asked defendant to stop, but he would not do so. Ramos testified that defendant pulled her shirt up, and he pulled her pants down to the middle of her buttocks. Before defendant started to massage her, he asked her when he had last had sex. She became frightened. She was afraid of defendant because she knew that he had beaten his children in the past. After defendant started massaging Ramos' back, he took off his shirt and laid on top of her. He got up and licked her butt crack. She told him to stop, noting that he was her uncle, and defendant told her to pretend he was not her uncle. Ramos ended up on her back, and she was squirming. He squirmed with her, holding her hands. He touched her breast.

Based on the clear, unambiguous language of the policy, defendant's conduct cannot be characterized as an accident. An accident, pursuant to this particular policy, is "a fortuitous

event or chance happening . . .” Defendant’s conduct was not fortuitous or by chance. He deliberately engaged in the conduct in which he engaged. While he might not have intended for it to be for sexual gratification or to cause harm to Ramos, his intention is irrelevant for purposes of this policy language.[1] The trial court erred by denying Auto Club’s motion for summary disposition because the suit did not arise from an occurrence as defined in the policy.[2]

Reversed and remanded for entry of an order granting Auto Club’s motion for summary disposition in favor of Auto Club. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering

[1] Defendant presents arguments based on policy language different from the language of the policy in this case. His arguments are unconvincing.

[2] Auto Club contends that even if an “occurrence” occurred, all of Ramos’ allegations against defendant fall squarely within its “sexual molestation” and “criminal acts” exclusions. Having found a question of fact on the “occurrence” issue, the trial court did not analyze whether one or more policy exclusions would negate any possible coverage under the policy. Similarly, this Court need not address these arguments in light of our conclusion that the suit did not arise from an occurrence as defined in the policy.